No. 19,866

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BERNARD D. FLAXMAN,

Appellant,

vs.

GEORGE GARDNER, Trustee in Bankruptcy for Pride Furniture Manufacturing Ltd.,

Appellee.

PETITION FOR REHEARING.

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To the Honorable Stanley N. Barnes, Frederick J. Hamley and Gilbert H. Jertberg, Circuit Court Judges:

Comes now Bernard D. Flaxman, Appellant above named, and respectfully petitions the Court for rehearing of its judgment entered in the above matter on November 19, 1965 for the following reasons:

1. That in its decision of November 19, 1965, this Court, in part, held that the propriety of a superseded Assignee's disbursements is to be determined by the benefit resulting from said disbursements to the ensuing bankrupt estate. That the holding herein enumerated has a public importance which transcends the controversy between Appellant and Appellee. That said holding threatens the general assignment for the benefit of creditors as a liquidating device in the sense that it imposes a hindsight test upon an Assignee.

2. That there is presently pending before this Court the undocketed case of *Bass v. Quittner, Stutman & Treister,* a case involving the identical point of law enumerated in paragraph 1 hereof. That Appellant was unaware of the pendency of that case until subsequent to the rendition of this Court's decision on November 19, 1965. That Appellant has since studied the memoranda filed in the District Court in the *Bass v. Quittner, Stutman & Treister* matter, said District Court having reached a conclusion on the point of law enumerated in paragraph 1 hereof contrary to that of this Court. That the memoranda, filed as aforesaid in the District Court, raise certain important issues which were not presented to this Court in the briefs and oral argument. That the point of law enumerated in paragraph 1 hereof is of substantial public interest, as previously noted, and is of a highly technical nature. That Appellant believes that this Court may well be persuaded to revise its judgment of November 19, 1965 upon considering the issues and arguments raised in *Bass v. Quittner, Stutman & Treister.*

3. We believe that a portion of this decision should be clarified as it may mislead the courts below, for it does not clearly present what test is to be applied as to the propriety of the expenses and fees of an assignee for the benefit of creditors.

It is our impression that the Court properly applied § 2(a)(21) of the Bankruptcy Act, and held that the fees and expenses of an assignee may only be surcharged if they are either "improper or excessive". Then the Court stated on page 4 of its opinion that: "It was sensible for the referee to conclude that if a particular service, ordered by the assignee, was of no benefit to the

estate of the bankrupt, it would be "improper" within "the meaning of section 2(a)(21), . . ." Furthermore, the court seems to state on page 5 of its opinion that the further test as to propriety is whether the trustee would have found it necessary to use said services involved.

It is this writer's interpretation that the Court has held that if the trustee would have found it necessary to use said services involved, there would be a benefit to the estate, and therefore the assignee's pre-bankruptcy fees and disbursements would be proper under §2(a)-(21). Other bankruptcy practitioners interpret this opinion to mean that the referee has to make two determinations as to whether the disbursements have been proper. The first being whether or not there has been a benefit to the estate, the second being whether the trustee would have found it necessary to use said services involved. Since there has been much confusion among the bankruptcy practitioners as to the correct interpretation of this Court's holding, we pray that the Court grant our petition for rehearing so that the Court may clarify its opinion.

Wherefore, Appellant prays that this Court vacate its judgment of November 19, 1965 and grant rehearing in this matter concurrently with its hearing of *Bass v. Quittner, Stutman & Treister.*

Respectfully submitted,

FLAXMAN, COLEMAN, GORMAN & ROSOFF,
By MARTIN S. FRIEDLANDER,
Attorneys for Appellant.

Certificate.

I certify that in my judgment this Petition for Rehearing is well founded and is not interposed for delay.

MARTIN S. FRIEDLANDER